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NO. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STEERE TANK LINES, INC.,

Petitioner

v.

INTERSTATE COMMERCE COMMISSION

AND

UNITED STATES OF AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1.

Whether the court of appeals has been so chilled by the Supreme Court's stay of mandamus order issued March 29, 1982 in No. 82-86, *Interstate Commerce Commission* v. *American Trucking Associations, Inc. et al,* as to violate precedent by affirming Commission action on a basis in law totally different to the basis found in the Commission decision below.

2.

Whether the new standard formulated by the court of appeals for determining if applicant has established its *prima facie* case on public need improperly violates and nullifies the standard utilized for over 40 years by the Commission and re-enacted by Congress in the Motor Carrier Act of 1980.

3.

Whether evidence of the character of existing authorized common carrier service is material evidence in an application for a new Certificate of Public Convenience and Necessity under the Motor Carrier Act of 1980.

4.

Whether the mere anticipation of possible future use of a service, without more, proves public need for that service.

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OPINIONS BELOW

The June 10, 1981 decision of Review Board Number 2 of the Interstate Commerce Commission granting the application of Petroleum Transport, Inc. was served June 24, 1981. (Appendix A, 1a-3a) The administrative appeal of protestant Steere Tank Lines, Inc. was denied by the August 28, 1981 decision of Division 2 of the Commission, served September 2, 1981. (Appendix B, 4a-5a) The discretionary appeal to the Commission filed by protestant Steere Tank Lines, Inc. was denied by the October 19, 1981 decision of the entire Commission, served October 30, 1981. (Appendix

C, 6a) The Certificate of Public Convenience and Necessity granted by the Commission was served January 27, 1982. (Appendix D, 7a-8a) None of these decisions is reported.

Decision of the court of appeals on review affirmed the action of the Commission on September 27, 1982. This decision is reported at 687 F.2d 104. (Appendix E, 9a-16a)

Time for filing a Petition for Writ of Certiorari was extended to January 17, 1983 by Order of Justice Byron R. White. (Appendix F, 17a)

JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 1651(a).

STATUTES INVOLVED

Pertinent provisions of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (49 U.S.C. 10101, *et seq.*) are set forth in Appendix G, 18a-23a.

STATEMENT OF THE CASE

By application filed with the Interstate Commerce Commission January 30, 1981 under the "new certificate" provisions of the Motor Carrier Act of 1980,[1] Petroleum Transport, Inc. sought an initial Certificate of Public Convenience and Necessity authorizing transportation of *petroleum* and *petroleum products*, between points in Texas and New Mexico. In accordance with the contemporaneous regulations of the Commission, Petroleum Transport filed all its opening evidence with its application, this being in the form

[1] 49 U.S.C. 10922(b)(1), Appendix G (20a-21a, 23a).

of a verified statement from the applicant's President (G.M. "Buddy" Forbess) and four Commission forms entitled "Verified Certification of Shipper or Witness Support." No oral hearing was ever held, all evidence being presented in writing.

The four shipper Verified Certifications constituted the support testimony intended to establish the required showing "that the service proposed will serve a useful public purpose, responsive to a public demand or need." These were from representatives of Pride Refining, Inc. of Abilene, Texas; Farmland Industries of Amarillo, Texas; Goodpasture, Inc. of Brownfield, Texas; and Benton Oil Company of Lubbock, Texas.

The witness on behalf of Benton Oil Company was the same G.M. "Buddy" Forbess, President of Petroleum Transport and also President of Benton Oil Company. As witness for applicant, Mr. Forbess made no service proposal of a distinctive nature, did not suggest any service innovations and did not make a service proposal which would serve any particular "useful public purpose."

The witnesses of Farmland Industries and Pride Refining Company specifically declined to give any factual information relative to the character of presently available authorized common carrier service or to offer any reason why the availability of the proposed service would serve any useful purpose and be responsive to their needs, if indeed it would be. Each indicated it had traffic within the scope of the application and anticipated that it "would use" applicant if applicant were awarded a Certificate.

The Goodpasture witness, Robert Wilks, indicated that company ships fertilizer within the geographical scope of the application and needs common carrier service by some carrier

because Goodpasture's company trucks could not handle all its own traffic during the busy season. There is no representation as to the character of existing common carrier service. Mr. Wilks anticipated Goodpasture "would use" applicant's service if authorized.

As a member of the shipping public, G.M. "Buddy" Forbess (as President of Benton Oil Company) is a Phillips Petroleum distributor who ships petroleum products in his own company trucks within the geographical scope of the application. He testified Benton Oil uses the services of protestant Steere Tank Lines and that Steere's "service tends to be non-responsive." Shipments have to be scheduled in advance because of difficulty in getting trucks, according to Mr. Forbess.

Mr. Forbess is the only witness supporting the application who describes existing common carrier service in any way.

Inadequacy of existing service is suggested only by the Forbess testimony and seasonality of shipper traffic is mentioned only in the Wilks testimony, the latter not reflecting any problem in securing common carrier service — merely prompting use of it.

The testimony in opposition offered by the Steere witness along with Steere's protest to the application flatly denies the Forbess characterization of Steere service, further insisting Benton Oil rarely offers any traffic to Steere. Mr. Wilks leases a truck to Mr. Forbess which could be used by Mr. Forbess under the sought authority resulting in income as a trucker to Mr. Wilks. Steere, throughout the proceeding before the Commission, requested oral hearing with cross-examination of both these witnesses because of their obvious monetary interest in the grant of authority as truckers as distinguished from any need for common carrier service as

members of the shipping public. The veracity of the Forbess testimony was challenged and the dispute over material facts emphasized.[3]

The Steere witness further testified as to its authority, tank trucks, terminals and employees enabling it satisfactorily to perform all service which might be needed by the supporting shippers. It denied any inadequacy in its service and showed the Commission that those supporting the application established absolutely no useful public purpose to be derived from the proposed service and certainly no need for it.

The initial decision was rendered by Review Board Number 2, an employee board of the Commission. The application was granted with the ultimate statutory conclusion that applicant's "proposed operation will serve a useful public purpose, responsive to a public demand or need."[4] This ultimate conclusion was squarely based upon an evaluation of the evidence which led the Board "to conclude that presently available carriers, including sole protestant Steere, cannot satisfy shippers' complete transportation requirements."[4] That conclusion is the precise and *only* stated reason for the holding of successful establishment of public need for the proposed service. The factual finding upon which this conclusion is based is clearly stated in the immediately preceding sentence of the decision; i.e., shippers' claim "that present service and equipment levels are inadequate, particularly during peak production and shipping periods — hence their support for applicant here." Steere's

[3]No issue as to the procedural manner in which oral hearing was requested is involved.

[4]Appendix A (2a).

[4]Ibid.

request for oral hearing and cross-examination was denied because of "no material matters of fact xx in dispute."[6]

Steere timely filed its administrative appeal of right excepting to the Board refusal to allow oral hearing and cross-examination, requesting reopening of the record for oral hearing and cross-examination of Mr. Forbess and Mr. Wilks. Steere specifically challenged the conclusion the public would benefit from the grant.

Division 2 of the Commission denied Steere's administrative appeal commenting only on the oral hearing request. The Division reiterated the conclusion that no *material* facts were in dispute.[8] Steere thereupon filed its discretionary appeal to the Commission urging material facts to be in dispute as evidenced by the very decision of the Review Board on its face. Oral hearing for cross-examination was again requested, Steere still challenging the veracity of the testimony upon which the grant was based. The entire Commission denied this appeal without comment.[7]

Thus the final conclusion of the entire Commission was that applicant had established its threshold case of showing "that the service proposed will serve a useful public purpose, responsive to a public demand or need"[8] by proving to the Commission's satisfaction (albeit strongly contradicted) that "presently available carriers, including sole protestant Steere, cannot satisfy shippers' complete transportation requirements."[9]

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[6]Ibid.
[8]Appendix B (4a).
[7]Appendix C (6a).
[8]49 U.S.C. 10922(b)1(B).
[9]Appendix A (2a).

Petition for Review pursuant to 28 U.S.C. 2321, 28 U.S.C. 2341, *et seq.*, 5 U.S.C. 704 and Rule 15, *et seq.*, F.R.A.P. was timely filed by Steere in the court of appeals. The decision of the Commission as to applicant's threshold case being squarely based upon the finding of inadequate present service, that matter being strongly disputed by the parties and the Commission having ruled no dispute of material facts, thus no oral hearing, the principal issued raised in the court of appeals centered upon failure of applicant to establish its *prima facie* case as to useful public purpose.

The court of appeals correctly ruled an applicant must first show its proposed service "will serve a useful public purpose, responsive to a public demand or need" before any burden of proof shifts to a protestant.[10] The other two "new certificate" entry tests under the Motor Carrier Act of 1980[11] were disposed of quickly and are not raised again here.

The court of appeals decision correctly notes that only the testimony of Mr. Forbess supports the finding of inadequacy made by the Review Board and sustained by the entire Commission.[12] It considers the emphasis in the Commission decision upon "inadequacy of existing common carrier services rather than on the usefulness of the proposed new service" to be "unfortunate."[13]

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[10]Accord: "The statute puts the burden on the proponent to provide the Commission, at a minimum, with information which, if not rebutted, is sufficent to meet the statutory criterion of useful public purpose." *Pre-Fab Transit Company, Extension — Nationwide General Commodities*, 132 M.C.C. 409, 411, (Entire Commission, Jan. 9, 1981). See also H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 14, reprinted in 1980 U.S. Code Cong. & Ad. News, 2283, 2296.

[11]These are (1) applicants' burden to prove its own fitness, willingness and ability (49 U.S.C. 10922(b)(1)(A)) and (2) prostestants' burden of proving inconsistency with the public convenience and necessity (49 U.S.C. 10922(b)(1)) after applicant establishes its threshold case.

[12]Appendix E (14a).

[13]Appendix E (13a-14a).

Deciding the inadequacy testimony of Mr. Forbess was immaterial, thus accepting the *post hoc* rationalization of appellate counsel on brief (as opposed to the actual decision of the entire Commission), the court announced a totally new and unprecedented test by which "useful public purpose, responsive to a public need or demand" is to be measured.

The test is very succinctly stated as:

> "But the issue in this case is *not* whether present service is inadequate xxx but rather merely whether shippers 'would use' the new service."[14]

No precedent is cited for this test of "useful public purpose" other than the House Report issued in connection with the new legislation.[15] The test is not to be found in the Commission decisions below. It derives from the brief presented to the court of appeals by the General Counsel of the Commission, particularly counsel's defense of the Commission's refusal to grant oral hearing on the sole ground of "no material facts in dispute."[16]

Commission appellate counsel did not cite any precedent for the "would use" test. The idea evidently germinated in the Office of the General Counsel and is stated in the following curious argument at Page 21 of counsel's brief:

> "As Steere acknowledges (Br. 21), the Commission relied on the shippers' statements that they desired PT's

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[14]Appendix E (15a).

[15]H.R. Rep. 96-1069, *supra*.

[16]Appendix B (4a). The court's action, being unprecedented, raises the question of whether the court of appeals has been so thoroughly chilled by the Supreme Court's stay of mandamus order of March 29, 1982 in *Interstate Commerce Commission* v. *American Trucking Associations, Inc.* No. 82-86, still pending, as to unwittingly utilize improper methods to avoid further controversy with the Commission.

service because they had to arrange for common carrier equipment too long in advance or did not own enough trucks to carry their shipments during the busy season as evidence of need for PT's service. That reliance, however, did not render the issue of whether existing carriers could or would provide more service material to the decision. The shippers' statements that they desired PT's service and would use it was sufficient evidence of need for that service."

Essentially, then, the agency in reaching its decision relied upon evidence the veracity of which was severely challenged and then, to avoid the challenge, determined by the agency (and later the court of appeals) not to be material. Needing some different test which the *remaining* evidence would meet, the Commission counsel invented the "would use" test adopted by the court of appeals.

Neither the agency's appellate counsel nor the court of appeals cites any decisional precedent for the "would use" test.

Because the nature of the applicant's threshold case is at the heart of the multiplied thousands of "new certificate" entry applications being processed by the Commission pursuant to the Motor Carrier Act of 1980; because no other case is before the court involving such "new certificate" applications; because the Commission itself is seeking guidance from this court on its processing of the companion, but less vital, "restriction removal" applications pursuant to the Motor Carrier Act of 1980;[17] and because this court has not spoken directly on the law governing entry into regu-

[17] *Interstate Commerce Commission v. Steere Tank Lines, Inc., et al.*, No. 82-41, October Term, 1982, pending on Petition for Writ of Certiorari.

lated common carriage of property in the past eight years during which period considerable upheaval has occurred in this industry, it is imperative to petitioner, to motor carriers in general and to the shipping public that the court instruct the Commission on the limits within which it may act in promoting competition in the trucking industry.

REASONS FOR GRANTING THE PETITION

I.

BACKGROUND

A.

Case Law Development Prior to the Motor Carrier Act of 1980

The definitive departure point in the trend of giving more consideration to the value of competition (as opposed to legal sanction) in securing ever-improving motor carrier services for the public was the court's 1974 decision in *Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc.*, 419 U.S. 281, 95 S.Ct. 438. There the court sustained the Commission in its conclusion that the added competition provided by the infusion of new carriers into the marketplace was a valid means of securing better service for the public. Competition which aids in the achievement of the objectives of the national transportation policy is in the public interest. But this assumes, first, competitive service has been sought as a goad for achieving public benefit and that the evidence in a particular record supports a conclusion such a result may reasonably be anticipated. Competition merely as an abstract ideal, a viable substitute for regulatory entry control, was not embraced by the court in *Bowman*.

With encouragement from the Bowman decision, the Commission embarked upon an ever-intensifying policy embracing eased entry.

Momentum was added by several court of appeals decisions indicating the courts' view that the Commission *should* affirmatively consider the value of competition.[18] The undergirding of the policy favoring increased emphasis upon the value of competition was, however, clearly the belief that a competitive goad would result in less lethargy among existing carriers and increased effort on the part of all carriers to provide the best possible service for the public benefit. Thus the thought germinated — an applicant should not be required *always* to prove existing common carrier service patently inadequate and, failing that, always to be denied a Certificate. It might be enough for applicant to show he has proposed something better even though existing service is "good enough"; the benefits of competition should not be ignored if raised by the record. Perhaps the motor carrier industry had become too stabilized and was in danger of becoming a sleeping giant unresponsive to public need for service — so argued some.

Entry provisions of the Motor Carrier Act of 1935[19] required an applicant for a Certificate of Public Convenience and Necessity to prove its proposal to be "required

[18] *P.C. White Truck Line, Inc. v. I.C.C.*, 551 F.2d 1326 (1977); *Sawyer Transport, Inc. v. U.S.*, 565 F.2d 474 (1977). In a much relied upon court of appeals decision just prior to July 1, 1980, the court affirmed the Commission conclusion applicant *had* established a need for improved new service and succeeded in showing *inadequacy* of existing services. Its language on the extent to which competition might be allowed adversely to affect existing carriers was the most extreme to that date, however. *May Trucking Co. v. U.S.*, 593 F.2d 1349 (1979).

[19] 49 Stat. 543.

by the present or future public convenience and necessity."[20] The tests whereby the statutory requirement might be met were soon formulated by the Commission and announced in *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936). These criteria are:

> xx [W]hether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest."

This test, with some variation of emphasis on one or another factor, stood for over four decades.[21]

Now, in September, 1979, noting the remand in *P.C. White*, *supra*, and encouraged by its recent success in *May*, *supra*, in defending its increasing emphasis on competition in the marketplace as the arbiter rather than its own regulatory power, the Commission issued its decision in Ex Parte No. MC-121, *Policy Statement on Motor Carrier Regulation*[22] expressing its conviction the motor carrier industry:

> "is generally financially strong, that many segments of the industry have largely 'competitive characteristics and are capable of being regulated primarily by the economic forces of the market place, and that the artificial protections which strict government regulations of entry can provide are currently unnecessary in those instances'."

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[20]Former 49 U.S.C. 307.

[21]*Airport Shuttle Service, Inc. v. I.C.C.*, 676 F.2d 836 and cases cited at 676 F.2d 840.

[22]44 F.R. 60296 (1979).

The substantive holding of Ex Parte No. MC-121 was to eliminate the second *Pan American* criterion and to make clear that the primary burden under the third criterion falls upon the persons opposing a grant. In so doing, however, the Commission did not eliminate the first criterion, and it did expressly hold the burden of proving the first criterion to be upon applicant.

Two court of appeals decisions tie directly to Ex Parte No. MC-121, the first dealing with review of Commission adjudication leading into the policy statement [23] and the second a direct review of the policy statement.[24]

In both decisions the reviewing court squarely held the burden to demonstrate a public need for the proposed new services lies upon the applicant. The second decision affirms Ex Parte No. MC-121 and in doing so holds the "elimination of attention to the adequacy of existing service *as an independent policy factor* does not violate existing case law but rather conforms to the mandate of this and other courts that the Commission *consider the benefit of additional competition to the public, despite the adequacy of existing service.*" (emphasis supplied)[25]

And the court further held:

> "Moreover, applicants must still demonstrate a public need for the service."[26]

Certiorari was not sought by the parties in this second proceeding. The Supreme Court has not validated a tossing

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[23] *Assure Competitive Transportation, Inc. v. U.S.*, 629 F.2d 467 (CA 7, Aug. 7, 1980), cert. denied Jan. 26, 1981.

[24] *Assure Competitive Transportation, Inc. v. U.S.*, 635 F.2d 1301 (CA-7, Dec. 30, 1980).

[25] 635 F.2d 1306.

[26] Ibid.

aside of any part of the test of public convenience and necessity which has existed for more than four decades and the reviewing court of appeals in *Assure Competitive Transportation, supra,* did *not* hold the character of existing service to be immaterial under the revised criterion announced in Ex Parte No. MC-121.

B.

The Effect of the Motor Carrier Act of 1980 Upon New Certificate Entry Standards

Congress reworded the "new certificate" entry provisions when it enacted the Motor Carrier Act of 1980, effective July 1, 1980.[27]

The applicant's threshold case requires it to prove, as here pertinent, "on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need."[28]

Congress thereby adopted the *exact* language of the first *Pan American* criterion, created by the Commission itself in 1936 and used consistently since that time, as the test to be applied first in deciding whether an application for a motor carrier of property Certificate of Public Convenience and Necessity should be granted.

Even where an application is uncontested the applicant must meet "his *prima facie* showing of public need"[29] and

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[27]Appendix G (23a).

[28]Ibid.

[29]H.R. Rep. 96-1069, *supra,* p. 15; *Roger A. Etzler, Extension — Canned Goods,* MC-26970 (Sub 13) (1946), 5 Fed. Car. Ca. Para. 31,115.01.

that is to be accomplished under the *same* test first announced in 1936.

Congress noted ways in which an applicant might attempt to establish its threshold case. Such factors include "need or demand for *new* services, innovative quality or price options, increased competition, greater fuel efficiency, improved service for small communities, improved opportunities for minorities, and any other benefits that would serve a useful public purpose."[30] (emphasis supplied) The Commission also has left the door open[31] for applicants to propose a "better mousetrap" in any way their inventiveness can conceive — but actual useful public purpose must be established by proof. Economic theories, political philosophies, shippers' whims, profit to one entity at the expense of another and the like do not meet the test.

The public purpose of competition is fully recognized by Congress for it notes:

> "The Act will also serve as a constructive stimulus to existing carriers to improve service and meet the changing requirements of shippers and receivers."[32]

There is no indication in this Congressional action (as well as in the decisions of the various courts) that increased competition, as an abstraction unrelated to a factual showing in the application record, has any place in the legitimate threshold showing an applicant must make.

Nor does the Motor Carrier Act of 1980 lend any credence to a theory that the mere cloning of the existing service by an endless procession of additional carriers (each providing

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[30] Id. Only "new services" or "increased competition" can be considered pertinent in any way in this proceeding.

[31] *Tri-State Motor Transit Co. Ext. — General Commodities*, 132 M.C.C. 504, 513 (1981).

[32] H.R. Rep. 96-1069, *supra*, p. 14.

identical transportation) serves any useful public purpose. The very fact Congress saw fit to continue entry control contradicts the notion that national policy unqualifiedly favors competition.[33]

That an applicant may properly seek to establish his proposal for a *new* or better service (and present testimony from shippers who claim a *need* for that *new* service) as furthering a useful public purpose is beyond cavil.

On the other hand, if applicant proposes nothing innovative — merely more of the same service — and increased competition is the only result of a grant, applicant must show the more intensive competition would be beneficial to the public — likely to result in needed better service — and not mere destructive competition which would be contrary to national policy.[34]

In either event, the character of existing service is manifestly a material consideration for it provides the standard against which applicant's proposal is to be measured. Proof that existing service is usable may not defeat a proposal to improve service under the test (for a 20-mule-team wagon train might be usable), but to rule the character of existing service immaterial is to negate any possibility of determining whether applicant's proposed service would be better or, may be, even less desirable.

The most effective way to show an applicant's proposed service would be beneficial and would serve a useful public purpose is through the testimony of shippers having traffic within the territorial and commodity scope of the applica-

[33] *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 93, 73 S.Ct. 998, 1003 (1953); *American Trucking Associations, Inc. v. I.C.C.*, 659 F.2d 452.

[34] 49 U.S.C. 10101(a)(2)(3)(4)(6) and (7)(D) and (F).

tion.[35] Their mere appearance as witnesses, however, proves nothing. The new Act does not contemplate a popularity poll for new entrants who propose a service identical to that already available.

On the contrary, the purpose of their testimony is — once having qualified themselves as having a legitimate and representative interest in the proposed service — to show *how* it would be beneficial and *why* its availability would serve a useful public purpose.[36] Stated simply, they should testify applicant does indeed have something better to offer which, if available, would benefit them in some identifiable way.[37] This is the historical first test of *Pan American* which was re-enacted verbatim by Congress in the Motor Carrier Act of 1980.

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[35]H.R. Rep. 96-1069, *supra*. p. 14.

[36]"***, [S]hipper supported applications should provide sufficient information for us to determine the basic nature of the public's transportation needs or demands of which their supporting shippers' statements are representative." *Pre-Fab Transit Company, supra*, 132 M.C.C. 413 (1981).

[37]For example: new armored truck service needed, *Mercer & Dunbar, Inc. Common Carrier Application*, 13 M.C.C. 683 (1939); truck service in addition to rail service needed to move uncrated furniture, *Paul S. Crebs Extension*, 24 M.C.C. 16 (1940); needed improvement of rail less-than-carload service by use of trucks, *C & O Railway Co. Extension — West Virginia*, MC-109867 (Sub 4)(1953), 9 Fed. Car. Ca. Para. 32,772; call-on-demand service needed in addition to scheduled service, *Jensen Extension-Corn Syrup*, 54 M.C.C. 271 (1952); need for express service providing greater care, security and speed-in-transit than ordinary freight service, *Mistletoe Express Service, Extension-Texas*, MC-42405 (Sub 3)(1953); 9 Fed. Car. Ca. Para. 32,793;need for new single-line service to eliminate transfer of lumber from one truck to another, *Dorr, Extension-Lumber*, 49 M.C.C. 561 (1949); need for pressure vessel tank trucks to facilitate developing distribution of anhydrous ammonia, *Groendyke Transport, Inc. Extension — Etter*, MC-111401 (Sub 12)(1951), 8 Fed. Car. Ca. Para. 32,147; improved household goods service needed in view of increased population mobility, *Fernstrom Storage and Van Co. Ext.-Nationwide Service*, 110 M.C.C. 452 (1969); need shown for improved regular route service, *Liberty Trucking Co. Ext.-General Commodities*, 130 M.C.C. 243 (1978).

Re-enactment by Congress of a long-established agency standard is not to be treated lightly by a reviewing court.[38]

II.

THE DECISION OF THE COURT OF APPEALS

A.

The Court of Appeals Did Not Uphold the Commission Upon the Same Basis Articulated in the Commission's Order

The Commission in its decisions below did not base its conclusion that applicant had established its *prima facie* case of public need on a proposal for innovative quality or price options or a new or different service. It did not base its decision on improved service for small communities or better opportunities for minorities. Greater fuel efficiency was neither proposed nor found.[39]

The Commission based its conclusion squarely on alleged inadequacy in present service and equipment levels.

Need shown by the record, in the view of the Commission, was precisely "for applicant's supplemental equipment and service."[40] The Commission *did* find present service inadequate and that was the only basis for its decision which was articulated in the order.

The court of appeals, on the contrary, based its conclusion a useful public purpose had been shown upon *other* testi-

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[38]*Chemehuevi Tribe of Indians v. Federal Power Commission*, 420 U.S. 395, 95 S.Ct. 1066.

[39]*Supra*, p.

[40]Appendix A (2a).

mony having no pertinency to the public need testimony relied upon by the Commission. Creating the "would use" test,[14] the court of appeals substituted a new and vastly different basis for concluding applicant had passed its threshold test.

In selecting different evidence and announcing a new standard by which to determine the public need, the court of appeals not only went far beyond the bounds set by the Supreme Court for court review of agency action but also established a new norm so distinctive and binding as probably to have required notice and comment if promulgated by the agency itself.[42]

The "would use" test is not an agency-created standard affirmed by a reviewing court of appeals. It was patently borne by that court itself and *substituted* for the standard actually used by the agency.

But the Supreme Court has held "an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.' "[43]

The court should grant certiorari because hastily conceived judge-made substantative law affecting the rights of

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[41] *Supra*, p.

[42] 5 U.S.C. 553; *Brown Express, Inc. v. United States*, 607 F.2d 695, 701.

[43] *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169, 83 S.Ct. 239, 245-50. Accord: "If those [the agency's] grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577.

literally thousands upon thousands of motor carriers and their multitudinous employees and customers and directing agency action at loggerheads with Congressional mandate demands control which can emanate only from this court. Congressional oversight[44] is no substitute for this court's review of agency and lower court implementation of the Motor Carrier Act of 1980. Failure of the court to act now can only result in growing controversy.[45]

B.

The Decision Below Undermines the Entire Regulatory Scheme of the Motor Carrier Act of 1980

By a too simplistic reading of one sentence in the legislative history of the Motor Carrier Act of 1980, the court of appeals shatters four decades of substantive law. The rationale of the decision relies solely upon:

> "The normal way to establish this has been for applicants to submit evidence of some of those who would use the service proposed."[46]

Congress by this language distinguished between types of witnesses first and, secondly, between types of supporting evidence.

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[44]Appendix G (19a).

[45]Commission implementation of the 1980 Act has resulted in at least the following review actions: *Steere Tank Lines, Inc., v. I.C.C.*, 675 F.2d 103; *Steere Tank Lines, Inc. v. I.C.C.*, 675 F.2d 763; *A.T.A. v. I.C.C.*, 682 F.2d 487; *Dean Truck Lines, Inc. v. I.C.C.*, 688 F.2d 254; *Provost Cartage, Inc. v. I.C.C.*, 686 F.2d 221; *J.H. Rose Truck Line, Inc. v. I.C.C.*, 683 F.2d 943; J.H. Rose Truck *Line, Inc. v. I.C.C.*, 683 F.2d 952; *Alamo Express, Inc. v. I.C.C.*, 673 F.2d 852; *Refrigerated Transport, Inc. v. I.C.C.*, 673 F.2d 1196; *A.T.A. v. I.C.C.*, 688 F.2d 1337; *Containerfreight Corp. v. U.S.*, 685 F.2d 329; *Coastal Tank Lines, Inc. v. I.C.C.*, 690 F.2d 537; *Refrigerated Transport, Inc. v. I.C.C.*, 686 F.2d 881; *Port Norris Exp. Co., Inc. v. I.C.C.*, 687 F.2d 803.

[46]H.R. Rep. 96-1069, *supra*, p. 14.

First, it noted that the term "persons supporting the issuance of the certificate"[47] is classified to include "public officials, shippers, receivers, trade associations, civic associations, consumers, and employee groups, as well as by the applicant itself."[48] Efforts to show public need by persons other than shippers or receivers of freight formerly were accorded little weight and usually challenged.[49] Thus Congress clarified the issue. Persons other than shippers and receivers are to be heard — but shippers and receivers are the preferred witnesses.

In addition, various types of supporting evidence are to be considered. The best witness is the person who tenders traffic and his testimony may relate to a number of factors such as: (1) need for new service or (2) improved service for small communities or (3) innovative price options. While that type evidence from that particular person "is still the most effective evidence"[50] it is not the *only* evidence from the *only* type witness which should now be considered.

Presumably, a representative of a minority association should be allowed to testify. His testimony would be of little value, however, if he testified no farther than to say: "I am a member of a minority group and I support the application." This would qualify him as a witness to be heard but would not prove that a grant would serve a useful public purpose. To be of any actual support, he would also need to show *why* he supports this particular applicant and *how* a grant would likely result in "improved opportunities for minorities."

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[47]Appendix G (23a).

[48]H.R. Rep. 96-1069, *supra*, p. 14.

[49]*Trans-American Van Service, Inc. Common Carrier Application*, MC-22254 (1944), 4 Fed. Car. Cs. Para. 30, 726; *Hughes Transportation, Inc., Extension-Interchange Point*, 64 M.C.C. 46, 67 M.C.C. 235 (1955, 1956).

[50]H.R. Rep. 96-1069, *supra*, p. 14.

Unfortunately the court of appeals mistakes the type of evidence for the type of witness. Those who "would use" the service are *in a position* to offer the most effective evidence but if they do not disclose the *reason* for their support — if they do not reveal why they support the application or show the proposed service would benefit them as representatives of the shipping public — they have not aided applicant in proving a "useful public purpose."

In referring to the "normal way to establish" public need Congress looked to the precedent of the past four decades. "Still the most effective evidence" is that type normally, typically, usually, historically relied upon by the Commission, shipper evidence which shows why applicant is needed.[51]

The court of appeals decision eliminates the need for any showing of the *reason* a shipper supports an applicant. Certainly those who support on the basis of availab'e traffic are the most effective witnesses, but their mere anticipation of a tender to applicant, if authorized, does not establish a useful public purpose.

By obviating the requirement that a shipper show why he supports an applicant, the court of appeals decision undermines the entire scheme of entry control by regulation. This record demonstrates why.

The same shippers whose testimony is relied upon by the Commission — but held to be immaterial — have a pecuniary interest in the grant distinct from any interest as a shipper. Had Mr. Wilks testified as a truck lessor he might have shown some useful public purpose such as saving fuel consumed by his truck when leased to applicant. He testified

[51]Explanation at footnote 37, *supra*.

only as a shipper, showing no advantage to his employer as a shipper, thus leaving the clear inference his support was secured by means not admitted by himself and thereby effectively concealing useful public purpose, if any.

The Farmland Industries and Pride Refining witnesses similarly show nothing in the way of a useful public purpose to be served, merely endorsing the duplication of existing service. The resulting increased competition might have been cited as offering some specific benefit to these two shippers if such were the case. Even this is not accomplished for no mention of expected benefits to be derived from competition will be found in their testimony.

The net effect of the decision is, therefore, the opening of the door to unlimited competition without any showing of public benefit. This could not have been the intention of Congress for had that been the goal, entry control would surely have been eliminated rather than re-enacted. If the marketplace were to be the arbiter through survival of the fittest rather than the Commission by rational judgment, the entry provisions would never have been passed.

Moreover, the record below shows how this decision undermines what little entry control remains at the Commission.

The Commission is now refusing to set any motor carrier of property entry application for oral hearing. The lengths to which it goes in refusing oral hearing and cross-examination is demonstrated by its decisions below. The knowledge that no application will be set for oral hearing and no shipper ever cross-examined inevitably leads to careless testimony.[52]

[52]The fundamental right to a hearing includes not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. See *Morgan v. U.S.*, 304 U.S. 1, 18, 58 S.Ct. 773, 776.

The elimination of any likely confrontation by existing carriers inexorably leads to careless statements by shippers philosophically inclined toward total freedom of entry.[53]

In the record below, the firm refutation of charges against Steere is disregarded entirely and the claims of Mr. Forbess accepted entirely thus completing the injustices begun by refusing Steere the right to confront its accuser.

The government form requiring only the filling in of blank spaces has replaced not only the oral testimony previously required but also the affidavit more recently used.[54]

Now applicant's representative may fill in the blank spaces and the effort required of the shipper is merely to sign the form — all the while being assured his anticipation of future use of the proposed service is not contractual in nature, merely anticipatory. Indeed, today the signing of the form may mean little more than a shipper wishing to get rid of a motor carrier salesman expeditiously.

Somewhat insulated from any probability of ever hearing of the matter again, the shipper has no compulsion toward veracity.[55]

Over against this reality now facing existing carriers opposing new authorizations, the court removes the last vestiges of entry control by eliminating any requirement for shippers to explain their *reasons* for desiring the proposed service. The result of the court of appeals decision may well be the public interest reduced to nothing more than the

[53]See "The Need for Confrontation," Section 7.05, *Administrative Law Treatise*, K. C. Davis, West Publishing Co. (1958) and Section 12.1, Administrative Law Treatise, Second Edition, K. C. Davis, Pub. Co. (1979)

[54]Ex Parte No. 55 (Sub-No. 43), *Rules Governing Applications for Operating Authority*, 364 I.C.C. 508, 575-576.

[55]While the form contains the usual prejury provisions, nothing is being done to enforce them.

nuisance quotient of a persistent trucker asking a shipper to sign a form.

That is the state of entry control today and only this court is in a position to return rationality to regulation.

CONCLUSION

Former Vice-Chairman Stafford of the Commission in his dissent in Ex Parte No. MC-121, *supra*, best described the continual self-deregulation perpetrated by the Commission in the past several years in these words:

> "Had all of these changes occurred in one proceeding, I am confident that any reviewing court would have found that they exceeded the bounds of what an agency may do toward self-deregulation. The tactic of smaller, individual rulemakings, each with a limited specific change, has proven very effective in achieving major changes without legislation. Unfortunately no reviewing court has had the big picture before it; and I doubt if any court ever will."

This case contains many elements of the big picture. It provides a clear-cut record, isolating the basic issues and gives the court an ideal vehicle through which to delineate the limits within which the Commission may actively promote competition among the motor carriers of property.

In the interest of a stable national transportation system, the court should grant certiorari.

Respectfully submitted,

Hugh T. Matthews
555 Griffin Square Building
Suite 934
Dallas, Texas 75202
(214) 742-9175
Attorney for Steere Tank
Lines, Inc., Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 1983, I have served true and accurate copies of the foregoing Petition for Certiorari on all parties of record by first-class mail, postage prepaid, as follows:

Ms. Cecelia Higgins
Interstate Commerce Commission
Office of the General Counsel
Washington, DC 20423

Robert B. Nicholson, Esq.
George Edelstein, Esq.
Appellate Section-Antitrust Div.
Department of Justice
Washington, DC 20530

Hugh T. Matthews

SERVICE DATE
JUNE 24, 1981

APPENDIX A

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-154182

PETROLEUM TRANSPORT, INC.,
COMMON CARRIER APPLICATION
(Lubbock, TX)

Decided: June 10, 1981

Applicant seeks a certificate authorizing the operations described in the appendix. The evidence has been considered under the modified procedure. The application is opposed by Steere Tank Lines, Inc., a motor common carrier.

Steere asks that the proceeding be set for oral hearing. However, because we do not find any material matters of fact to be in dispute, protestant's request is denied.

Applicant has demonstrated that its proposed operation will serve a useful public purpose, responsive to a public demand or need. Applicant here seeks its initial operating rights from the Commission with the support of four firms it now serves in Texas intrastate commerce.

Benton Oil Company of Lubbock, TX, Goodpasture, Inc., of Brownfield, TX, Farmland Industries, of Amarillo, TX, and Pride Refining, Inc., of Abilene, TX, ship and receive various petroleum and petroleum products (including aviation gasoline, liquid fertilizers, and jet fuel) between their facilities, customers, and vendors scattered throughout Texas and New Mexico (representative points are provided). Shippers currently use motor common carriers and their own trucks to move their traffic but claim that present service and equipment levels are inadequate, particularly during peak production and shipping periods — hence their support for applicant here.[1]

[1]Steere emphatically denies shippers' allegations of service failure on its part.

Our evaluation of the evidence in this proceeding leads us to conclude that presently available carriers, including sole protestant Steere, cannot satisfy shippers' complete transportation requirements. As such, we find that a need has been established for applicant's supplemental equipment and service.

Although Steere is handling petroleum and petroleum products within the scope of this application, and fears material traffic and revenue loss as a consequence of applicant's competition, protestant has not shown, as required, that a grant here will materially jeopardize its systemwide operations, cause injury to the public, or generally be inconsistent with the public convenience and necessity. *Arrow Transp. Co. of Delaware Ext. — Boise, ID*, 131 M.C.C. 941 (1980). In fact, Steere's failure to compare revenues derived from service in the application territory with its overall revenues makes it impossible for us to accurately access the adverse impact, if any, a grant here might have upon protestant's ability to serve the public generally. In any event, we believe it highly unlikely that a small carrier like applicant, operating only 15 pieces of equipment, could divert significant traffic from a carrier as large and well-established as Steere.

For all of these reasons, we believe that the advantages to the four supporting firms here, and to the shipping public in general, of having applicant's proposed service outweigh any potential detriment to Steere. Accordingly, we conclude that the application should be granted.

We find:

Performance by applicant of the service described in the appendix will serve a useful public purpose, responsive to a public demand or need. Applicant is fit, willing, and able properly to perform the granted service and to conform to statutory and administrative requirements. This action will not significantly affect either the quality of the human environment or conservation of energy resources. An appropriate certificate should be granted.

It is ordered:

The application is granted to the extent set forth in the appendix. Operations may begin only following the service of a *certificate* and upon compliance with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043), designation of process agent (49 CFR 1044), and tariffs (49 CFR 1310).

Compliance with these requirements must be made within 90 days after the date of service of the decision or the grant of authority shall be void.

By the Commission, Review Board Number 2, Members Carleton, Fisher, and Williams.

Agatha L. Mergenovich
Secretary

(SEAL)

APPENDIX

Authority to conduct the following operations will be issued in an appropriate document. This decision does not constitute authority to operate.

To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *petroleum and petroleum products*, between points in Texas and New Mexico.

SERVICE DATE
SEPTEMBER 2, 1981

APPENDIX B
INTERSTATE COMMERCE COMMISSION
DECISION
No. MC-154182
PETROLEUM TRANSPORT, INC.,
COMMON CARRIER APPLICATION
(Lubbock, TX)

Decided: August 28, 1981

We have considered the application and the record in this proceeding, and the appeal filed by protestant Steere Tank Lines, Inc., and reply filed by applicant.

Prostestant Steere renews its request for oral hearing for the purpose of cross examining applicant and its witnesses. However, since there are no *material* facts in dispute and the issues have been resolved by means of the written materials which have been submitted, an efficient disposition of the proceeding can be made without oral hearing. Protestant's request is denied.

It is ordered:

Protestant Steere Tank Lines, Inc's motion for oral hearing is denied.

The appeal is denied because the findings of Review Board Number 2 are in accordance with the evidence and the applicable law.

Operations may begin only following the service of a *certificate* which will be issued upon compliance with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043) designation of process agent (49 CFR 1044), and tariffs (49 CFR 1310).

This decision will be effective 15 days from its date of service.

By the Commission, Division 2, Acting as an Appellate Division, Commissioners Gresham, Gilliam, and Taylor. Commissioner Taylor did not participate.

(SEAL)

Agatha L. Mergenovich
Secretary

NOTICE: This proceeding is now administratively final within the meaning of 49 CFR 1101.2(f) of the Commission's regulations; and, in accordance with the provisions of section 558(c) of the Administrative Procedure Act, any corresponding temporary authority expires and operations thereunder must cease upon the effective date of this decision, except that to the extent permanent authority is granted in this proceeding (and if partial, only to that extent) the corresponding temporary authority or portion thereof will continue in effect until a certificate or permit is issued and becomes effective. The filing of any further pleadings in this matter will not stay the expiration of the temporary authority related to the denied portion of the sought permanent authority.

SERVICE DATE
OCTOBER 30, 1981

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-154182 F

PETROLEUM TRANSPORT, INC.,
COMMON CARRIER APPLICATION
(Lubbock, TX)

Decided: October 19, 1981

We have considered the record in this proceeding, including the discretionary appeal filed by protestant Steere Tank Lines, Inc., and the reply by applicant, which embraces a motion to dismiss the appeal.

It is ordered:

The motion to dismiss is denied.

The appeal is denied.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam.

(SEAL)

Agatha L. Mergenovich
Secretary

SERVICE DATE
JANUARY 27, 1982

APPENDIX D

INTERSTATE COMMERCE COMMISSION CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

No. MC-154182

PETROLEUM TRANSPORT, INC.

(Lubbock, TX)

This Certificate of Public Convenience and Necessity is evidence of the carrier's authority to engage in transportation as a common carrier by motor vehicle.

This authority will become effective only when the carrier has met the compliance requirements pertaining to insurance coverage for the protection of the public (49 CFR 1043), the designation of agents upon whom process may be served (49 CFR 1044), and tariffs or schedules (49 CFR 1300 through 1310, revised). The carrier shall also render reasonably continuous and adequate service to the public. Failure to meet these conditions will constitute sufficient grounds for the suspension, change, or revocation of this authority.

This authority is subject to any terms, conditions, and limitations as are now, or may later be, attached to this privilege.

For all carriers: Any duplication in this authority and rights currently held does not confer more than one operating right.

For common carriers with irregular route authority: Any irregular route authority authorized in this certificate may not be tacked or joined with your other irregular route authority unless joinder is specifically authorized.

The transportation service to be performed is described on the reverse side of this document and will be valid as long

as the carrier maintains compliance with the above requirements.

By the Commission.

Agatha L. Mergenovich
Secretary

(SEAL)

Note: If there are any discrepancies regarding this document please notify the Commission within 30 days.

To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *petroleum and petroleum products*, between Texas and New Mexico.

APPENDIX E

STEERE TANK LINES, INC., Petitioner,

v.

INTERSTATE COMMERCE COMMISSION
and United States of America, Respondents.

No. 81-4497

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

September 27, 1982.

Competing trucking company appealed from order of the Interstate Commerce Commission granting a certificate of public convenience and necessity to transport company for authority to haul petroleum and petroleum products between Texas and New Mexico. The Court of Appeals held that: (1) the Commission's order satisfied "substantial evidence" standard for all three required showings under the Motor Carrier Act, and (2) oral hearing was not required.

Affirmed.

1. Commerce — 173

Under the Administrative Procedure Act, Court of Appeals must uphold findings of the Interstate Commerce Commission if they are grounded on such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. 5 U.S.C.A. §706(2).

2. Commerce — 108

Order of the Interstate Commerce Commission granting a certificate of public convenience and necessity to transport company to haul petroleum and petroleum products between Texas and New Mexico satisfied "substantial evidence" standard for required showings that transport company was "fit, willing, and able" to perform the proposed services, that

"the service proposed will serve as useful public purpose, responsive to a public demand or a need," and that transportation authorized by the certificate was not inconsistent with public convenience and necessity. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b)(1).

3. Commerce — 116

Oral hearing would have done nothing to change decision of the Interstate Commerce Commission granting a certificate of public convenience and necessity and, therefore, was not required. Interstate Commerce Commission Rules 1100.43, 11100.253(i)(3), 49 U.S.C.A.App.

Petition for Review of an Order of the Interstate Commerce Commission.

Before RUBIN, POLITZ and RANDALL, Circuit Judges.

PER CURIAM:

Petitioner Steere Tank Lines, Inc. appeals the grant of a certificate of public convenience and necessity to Petroleum Transport, Inc. Steere argues, first, that the Interstate Commerce Commission's findings supporting the certificate were arbitrary and capricious and not based on substantial evidence, and second, that Steere in any event should have been given the chance to cross examine Petroleum Transport's witnesses at an oral hearing. For the reasons set out below, we reject both arguments and find that the Commission's determinations were not arbitrary and capricious and were based on substantial evidence and that a hearing consisting solely of written submissions was enough.

Petroleum Transport, a small intrastate carrier based in Texas, originally applied in January, 1981, for authority to haul petroleum and petroleum products between Texas and New Mexico. Along with a verified statement of its president, Petroleum Transport accompanied its application with supporting affidavits from four shippers, who all said that they

would use the proposed new service. Steere, a much larger carrier already well established in the Texas-New Mexico petroleum hauling business, filed a timely protest. As it now often does in certificate application cases, the Commission handled the proceedings under a streamlined "modified procedure," which permits a decision on the basis of written submissions alone. *See* ICC Rules 43–52, 49 C.F.R. §§ 1100.43–.52 (1981). Six months later, in June, 1981, a review board of three Commission employees granted the application. *Petroleum Transport, Inc., Common Carrier Application*, No. MC–154182 (ICC Review Board No. 2 June 10, 1981). After Steere unsuccessfully appealed to a division of three Commissioners, the review board's decision automatically became final on August 28, 1981. The case has now come to us from the Commission on a direct appeal pursuant to 28 U.S.C. §§ 2321, 2341–2349 (1976). We turn first to the issue of substantial evidence.

1. THE SUBSTANTIAL EVIDENCE REVIEW.

Under the Motor Carrier Act of 1980, the Interstate Commerce Commission must make three important factual determinations before issuing a certificate of public convenience and necessity: the petitioner must carry an initial burden of showing that it is "fit, willing, and able" to perform the proposed services; the petitioner must show that "the service proposed will serve a useful public purpose, responsive to a public demand or need"; and (once the first two showings have shifted the burden of proof) protesting carriers must fail to carry their burden of showing that "the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity." 49 U.S.C.A. §§ 10922(b)(1) (West Supp.1982).

[1] Our review of the Commission's findings is necessarily quite limited. We may not disturb the Commission's order unless we find that its conclusions were "arbitrary, capricious, an abuse of discretion, . . . not in accordance with law, . . . [or] unsupported by substantial evidence." Administrative Procedure Act § 10(e)(2), 5 U.S.C. § 706(2)(1976).

We must, in other words, uphold the Commission's findings if they are grounded on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938)); *J. H. Rose Truck Line, Inc. v. ICC (Rose I)*, 683 F.2d 943 at 948–49 (5th Cir. 1982); *Nueces County Navigation District No. 1 v. ICC*, 674 F.2d 1055, at 1062 (5th Cir. 1982); *Alamo Express, Inc. v. ICC*, 673 F.2d 852, 856 (5th Cir. 1982); K. Davis, *Administrative Law Treatise* § 29.00–1, at 531 (Supp.1982) ("The term 'substantial evidence' can mean evidence which is deemed substantial, or it can mean agency action which is reasonable or which has a rational basis, or it can mean a mixture of those two ideas."). *See also Refrigerated Transport Co. v. ICC* 663 F.2d 528, 530–31 (5th Cir. 1982) (analyzing ICC order under an "arbitrary and capricious" — "substantial evidence" standard of review). And although it is true, as Steere has repeatedly emphasized in these proceedings, that a court "cannot 'accept appellate counsel's *post hoc* rationalizations for agency action'; for an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself,'" *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326, 41 L.Ed.2d 141 (1974) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69, 83 S.Ct. 239, 245–50, 9 L.Ed.2d 207 (1962)), it is equally true, as we have said in nearly every recent public convenience and necessity case, that "the Commission's explanation need not be crystalline, as long as it enables the parties to understand the basis of the decision," *J. H. Rose Truck Line, Inc. v. ICC (Rose II)*, 683 F.2d 952, at 956 (5th Cir. 1982); *Trailways, Inc. v. ICC*, 681 F.2d 252, 254 (5th Cir. 1982); *Alamo Express, supra*, 673 F.2d at 856; *Central Freight Lines, Inc. v. United States*, 669 F.2d 1063, 1074 (5th Cir. 1982).

Steere argues that the Commission has failed to meet the requisite standard for all three of the required findings. We find none of the arguments persuasive.

[2] As the Commission pointed out in its order of June 10th, *supra*, Petroleum Transport has fifteen pieces of equipment (truck tractors and trailers) with which to perform the proposed service. It is already engaged in the petroleum hauling business between points in Texas. Steere's argument that Petroleum Transport was not properly found to be fit, willing, and able therefore verges on the frivolous. *See Steere Tank Lines, Inc. v. ICC*, 675 F.2d 103 (5th Cir. 1982) ("fit, willing, and able" determination upheld for company that operated sixteen trucks from one terminal); *cf. American Trucking Associations, Inc. v. ICC*, 659 F.2d 452, 473 (5th Cir. 1981) (negative implication that carrier already having tank trucks and experienced in their proper use is virtually automatically "fit, willing, and able" to serve public for such loads), *clarified and enforced through mandamus*, 669 F.2d 957 (1982).

Steere's argument that the Commission wrongly determined that it had not met its burden of showing (in rebuttal) that the certificate granted "is inconsistent with the public convenience and necessity" also appears insubstantial. Steere operates 798 pieces of equipment from fourteen terminals in Texas and New Mexico. We conclude that the Commission's determination that it is "highly unlikely that a small carrier like applicant, operating only 15 pieces of equipment, could divert significant traffic from a carrier as large and well-established as Steere," *Petroleum Transport, Inc., Common Carrier Application*, *supra*, is based on substantial evidence and rationally supports a conclusion that granting the certificate "will [not] materially jeopardize [Steere's] systemwide operations, cause injury to the public, or generally be inconsistent with the public convenience and necessity." *Id.*

Steere's third argument — that Petroleum Transport has failed to meet its burden of showing that its proposed service will serve "a useful public purpose, responsive to a public demand or need" — is more serious, but also ultimately unpersuasive. The problem lies chiefly with an unfortunate emphasis in the Commission's order on the inadequacy of

existing common carrier services rather than on the usefulness of the proposed new service.[1]

As Congress noted when it passed section 10922(b)(1) of the 1980 Act, "[t]he normal way to . . . [meet this test] has been for applicants to submit evidence of some of those who would use the service proposed. [We think] that this is still the most effective evidence." H.R.Rep.No. 96-1069, 96th Cong., 2d Sess. 14, *reprinted in* 1980 U.S. Code Cong. & Ad.News 2283, 2296. All four of the shippers testifying for Petroleum Transport not only asserted that they "would use" the new service, but noted the exact number of shipments per month (or week) that they expected to tender if the new service were approved. The Commission's order unmistakably, if indirectly, indicates that it was aware of and considered this evidence. This is more than enough to satisfy the "substantial evidence" test. Our review need proceed no further.

We therefore conclude that the Commission's order satisfies the "substantial evidence" standard for all three of the required showings under section 10922(b)(1) of the Motor Carrier Act.

II. THE DENIAL OF AN ORAL HEARING.

Steere claims nonetheless that some of the evidence was ambiguous and that it should have been granted an opportunity to present its case at an oral hearing. The Commission responds, and we think persuasively, that the contested evidence is immaterial and that an oral hearing could serve no useful purpose.

---

[1]The Commission's order noted in particular, "Shippers currently use motor common carriers and their own trucks to move their traffic, but claim that present service and equipment levels are inadequate, particularly during peak production and shipping periods — hence their support for applicant here." *Petroleum Transport, Inc., Common Carrier Application, supra.* Steere correctly observes that only the testimony of G. M. "Buddy" Forbess supports this statement, and that his testimony is vigorously challenged by a witness for Steere. But as we explain in Part II, *infra*, Mr. Forbess' testimony is not necessary to support the grant of the certificate.

The Commission's rules state:

> The Commission may, in its discretion, order that a proceeding be heard under modified procedure [*i.e.*, without oral hearing] if it appears that substantially all important issues of material fact may be resolved by means of written materials and that the efficient disposition of the proceeding can be made without oral hearing.

ICC Rule 43, 49 C.F.R. § 1100.43 (1981). *See also*, ICC Rule 253(i)(3), 49 C.F.R. at § 1100.253(i)(3) (oral hearings granted "only where use of modified procedure would prejudice a party [or] material issues of decisional fact cannot adequately be resolved without an oral hearing"). The "material" contested issue in the present dispute concerns the testimony of G. M. "Buddy" Forbess, who testified both in his capacity as president of the petitioner, Petroleum Transport, and as president of Benton Oil, one of the four supporting shippers. The Commission determined that the new service would serve "a useful public purpose, responsive to a public demand or need" partly on the ground that present carrier services were inadequate, and only Benton Oil, through Mr. Forbess, seemed to be strongly dissatisfied with the present situation. Record at 9 ("Steere's service tends to be non-responsive. We have to arrange loads one (1) week in advance because of difficulty in getting trucks.").

[3] But the issue in this case is *not* whether present service is inadequate, *cf. Ex Parte No. MC-121*, 44 Fed.Reg. 60, 296-98 (1979) (ICC policy statement eliminating "adequacy of existing service" as an evidentiary factor insofar as it places "on the applicant the specific burden of showing that the service it proposes cannot be provided as well by existing carriers"), but rather merely whether shippers "would use" the new service. H.R.Rep.No. 96-1069, *supra*. On this issue, the record leaves no room for doubt. The new service will be used. It necessarily follows that even if Mr. Forbess were impeached during oral cross exam-

ination, the Commission would still issue the certificate. *See Trailways, Inc., supra*, 681 F.2d at 254 ("Although there clearly were disputed issues in this case, Trailways does not point to any issue of material fact as to which oral hearing was necessary for its efficient disposition, even though . . . the testimony of isolated witnesses might have been weakened by cross-examination as to details."); *cf. Rose I, supra* (upholding ICC certificate grant even though *no* shippers testified in its support). An oral hearing, in short, would do nothing to change the Commission's decision, and is therefore not required.

The order of the Commission is AFFIRMED.

APPENDIX F

Supreme Court of the United States

No. A-524

STEERE TANK LINES, INC.

v.

INTERSTATE COMMERCE COMMISSION
AND UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 17, 1983.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 10th day
of December, 1982.

APPENDIX G

Pertinent provisions of the Motor Carrier Act of 1980, unincorporated into Title 49—

PUBLIC LAW 96-296—JULY 1, 1980

Public Law 96-296
96th Congress

An Act

To amend subtitle IV of title 49, United States Code, to provide for more effective regulation of motor carriers of property, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Motor Carrier Act of 1980".

PURPOSE OF THE ACT

SEC. 2. This Act is part of the continuing effort by Congress to reduce unnecessary regulation by the Federal Government.

CONGRESSIONAL FINDINGS

SEC. 3. (a) The Congress hereby finds that a safe, sound, competitive, and fuel efficient motor carrier system is vital to the maintenance of a strong national economy and a strong national defense; that the statutes governing Federal regulation of the motor carrier industry are outdated and must be revised to reflect the transportation needs and realities of the 1980's; that historically the existing regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry; that protective regulation has resulted in some operating inefficiencies and some anticompetitive pricing; that in order to reduce the uncertainty felt by the Nation's transportation industry, the

Interstate Commerce Commission should be given explicit direction for regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy; that the Interstate Commerce Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress; and that legislative and resulting changes should be implemented with the least amount of disruption to the transportation system consistent with the scope of the reforms enacted.

(b) The appropriate authorizing committees of Congress shall conduct periodic oversight hearings on the effects of this legislation, no less than annually for the first 5 years following the date of enactment of this Act, to ensure that this Act is being implemented according to congressional intent and purpose.

NATIONAL TRANSPORTATION POLICY

SEC. 4. Section 10101(a) of title 49, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (5);

(2) by striking out the period at the end of paragraph (6) and inserting in lieu thereof "; and"; and

(3) by adding at the end thereof the following new paragraph:

"(7) with respect to transportation of property by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers; (F) improve and

maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation."

MOTOR CARRIER ENTRY POLICY

SEC. 5. (a) Section 10922 of title 49, United States Code, is amended—

(1) in subsection (a) by inserting "of passengers" after "motor common carrier";

(2) by redesignating subsections (b), (c), (d), (e), and (f), and all references thereto, as subsections (c), (d), (e), (f), and (g), respectively; and

(3) by inserting after subsection (a) the following new subsection:

"(b) (1) Except as provided in this section, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title as a motor common carrier of property if the Commission finds—

"(A) that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission; and

"(B) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need;

unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity.

"(2) In making a finding under paragraph (1) of this subsection, the Commission shall consider and, to the extent applicable, make findings on at least the following:

"(A) the transportation policy of section 10101(a) of this title; and

"(B) the effect of issuance of the certificate on existing carriers, except that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity.

"(3) The Commission may not make a finding relating to public convenience and necessity under paragraph (1) of this subsection which is based upon general findings developed in rulemaking proceedings."

Pertinent provisions of
Title 49 with the Motor Carrier Act
of 1980 incorporated—

§ 10101. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters;

(6) to encourage fair wages and working conditions in the transportation industry; and

(7) with respect to transportation of property by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

§ 10922. Certificates of motor and water common carriers

(a) Except as provided in this section and section 10930(a) of this title, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title as a motor common carrier of passengers or water common carrier, respectively, if the Commission finds that—

(1) the person is fit, willing, and able—

(A) to provide the transportation to be authorized by the certificate; and

(B) to comply with this subtitle and regulations of the Commission; and

(2) the transportation to be provided under the certificate is or will be required by the present or future public convenience and necessity.

(b) (1) Except as provided in this section, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title as a motor common carrier of property if the Commission finds—

(A) that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission; and

(B) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need;

unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity.

(2) In making a finding under paragraph (1) of this subsection, the Commission shall consider and, to the extent applicable, make findings on at least the following:

(A) the transportation policy of section 10101(a) of this title; and

(B) the effect of issuance of the certificate on existing carriers, except that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity.

(3) The Commission may not make a finding relating to public convenience and necessity under paragraph (1) of this subsection which is based upon general findings developed in rulemaking proceedings.

HUGH T. MATTHEWS
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(214) 748-9175

MAR 8 PAGE 2

March 4, 1983

Mr. William Gullickson
Office of the Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: No. 82-1202; Steere Tank Lines, Inc. v. Interstate Commerce Commission

Dear Mr. Gullickson:

Transmitted herewith are the orders and decisions of the Interstate Commerce Commission in Docket No. MC-121794 (Sub-No. 7), James Wilkett, d/b/a Wilkett Trucking Company, referred to in the Respondents' brief at Footnote 2, Page 4.

Sincerely yours,

Hugh T. Matthews

Hugh T. Matthews

HTM/mj

cc: Rex E. Lee, Solicitor General
John Broadley, Esq.
Henri F. Rush, Esq.
Cecelia E. Higgins, Esq.

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SERVICE DATE

MAY 20 1981

FEC

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-121794 (Sub-No. 7)

JAMES WILKETT, D/B/A WILKETT TRUCKING COMPANY
(Stigler, OK)

Decided May 11, 1981

The application in this proceeding was published in the Federal Register on April 9, 1981, and protests are due May 26, 1981. Information relating to applicant's fitness has been brought to the attention of the Commission. The proceeding will therefore be designated for oral hearing, and on our own motion, the Office of Consumer Protection will be directed to participate.

It is ordered:

The proceeding is designated for oral hearing at a time and place to be fixed.

The Office of Consumer Protection is directed to participate in this proceeding for the purpose of developing the record on the issue of applicant's fitness.

By the Commission, Acting Chairman Alexis, Commissioners Gresham, Clapp, Trantum, and Gilliam.

(SEAL)

Agatha L. Mergenovich
Secretary

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OH/ID

INTERSTATE COMMERCE COMMISSION

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DECISION

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SERVICE DATE
SEP 29 1981

No. MC-121794 (Sub-No. 7F)

JAMES WILKETT, D/B/A WILKETT TRUCKING COMPANY
- EXTENSION - OKLAHOMA AND TEXAS
(Stigler, OK)

Decided: September 22, 1981

John J. McMackin, Jr., Esquire, Robert C. Bamford, Esquire, and Ed Edmondson, Esquire for Applicant.

Ann P. Van Gaasbeck, Esquire and Simon W. Oderberg, Esquire for the Office of Consumer Protection.

By William A. Shue, Administrative Law Judge:

By an appropriately filed application, James Wilkett d/b/a Wilkett Trucking Company (Wilkett) seeks a certificate authorizing operation as a common carrier by motor vehicle over irregular routes, transporting coal and coal products between points in Oklahoma and Texas. By order dated May 11, 1981, the Commission ordered the proceeding to be designated for oral hearing and directed the Office of Consumer Protection (OCP) to participate in the proceeding for the purpose of developing the record on the issue of applicant's fitness. The matter was assigned to the undersigned and an oral hearing was held in Muskogee, OK on August 11, 1981. Appearances were made on behalf of applicant and the Office of Consumer Protection. Briefs were filed by both parties and full consideration has been given to matters presented on them.

FINDINGS OF FACT

On February 12, 1981, Mr. James D. Wilkett, applicant in this proceeding, was convicted of conspiracy to distribute a controlled substance (dilaudid) and given a sentence of 15 years' confinement to the federal correctional institution at El Reno, Oklahoma. Mr. Wilkett commenced serving his sentence on February 26, 1981. Four days before he entered prison James Wilkett d/b/a Wilkett Trucking Company filed the application at issue. The application was submitted by James D. Wilkett as sole proprietor, and was supported by Great National Corporation - Nevada; Randall & Blake, Inc., an Oklahoma corporation; and Westhoff Brothers, Inc., a Kansas corporation, all of whom are coal producers.

Testimony at the hearing consisted primarily of the presentation of prepared statements. Two shippers were present: Mr. John Heatherly, President of Heatherly Mining, Inc., and Mr. Murray A. Bennett, Supervisor of Davis Coal Corporation's coal operations. These two supporting shippers use Wilkett Trucking virtually exclusively and expressed both satisfaction with the current level of service and a desire to expand their relationship with the carrier. As producers of large amounts of coal, these shippers require large numbers of trucks available for loading in coordination with production. Wilkett Trucking equipment was stated to be both reliable and available when needed.

Mr. Jerry D. Jackson, Chairman of The Board and President of The First National Bank of Stigler, Oklahoma, testified that applicant has borrowed regularly from his bank since May 1978. The applications were made by Mr. Wilkett and his wife, Gladys. Loan payments are made regularly. Mr. Jackson expressed the opinion that Wilkett Trucking Company is in sound financial condition and is creditworthy.

Mr. J. D. Snow, a local businessman and pastor of New Hope Church in Stigler, Oklahoma, where the carrier is located, testified as to the applicant's good business reputation. He also testified as to the good character of Mr. Wilkett's wife, as well as that of Mr. Davey Wilkett and Gwen (Gwendolyn J.) Overlease, two of applicant's children who are involved in the operation of the carrier. No testimony was offered relating directly to the personal character of Mr. James D. Wilkett.

Wilkett Trucking Company's program for compliance with DOT safety regulations, ICC accounting regulations and other pertinent statutes and regulations was detailed by Mr. Clifford L. Phillips, former District Supervisor for the Commission. Mr. Phillip's became the carrier's regulatory compliance supervisor on July 1, 1981. At the time, ICC and DOT regulations were explained to carrier personnel and a program instituted to insure compliance. A visit by Mr. Phillips on August 5th revealed efforts had been and were being made to implement the compliance program. The next compliance survey to be conducted by Mr. Phillips will take place in November.

The remaining witnesses were members of the Wilkett family involved in current operations. Two of Mr. James D. Wilkett's daughters, Gwendolyn J. Overlease and Connie M. Weatherford, conduct much of the recordkeeping and office paperwork, including that involved with maintenance of the compliance program. Mrs. Gladys Wilkett shares general supervisory and dispatching duties with applicant's son Mr. Davey Wilkett.

Mr. Davey Wilkett is primarily responsible for the daily management and operations of the carrier. Before his father went to prison, the son managed the business during his father's absences for vacation or illness. Since Mr. James D. Wilkett began serving his sentence on

February 26, 1981, Mr. Davey Wilkett has assumed the position of general manager responsible for general business decisions, traffic management, supervision of operations, and maintenance supervision.

However, Mr. James D. Wilkett has not withdrawn from the active daily management of Wilkett Trucking Company. He calls his son daily. Mr. Davey Wilkett testified that these telephone calls deal with all aspects of the business including such subjects as the number of trucks that have become disabled. Mr. James D. Wilkett continues to make management decisions.

Furthermore, the applications and testimony indicate that Wilkett Trucking Company is a sole proprietorship owned by Mr. James D. Wilkett individually. Mr. Davey Wilkett, however, stated that in his opinion his father and mother were co-owners. Witness Jerry G. Jackson, the banker, testified that applicant applied for the loans, but that both husband and wife had signed the applications. This evidence is not a rebuttal of applicant's sole ownership, but rather a reflection of the fact that a family business normally includes an investment of time, credit, and effort by all members of the family, particularly the spouse. Mrs. Gladys Wilkett was not shown to have an ownership interest in the carrier.

Evidence was presented by the Office of Consumer Protection verifying the federal felony conviction of Mr. James D. Wilkett for violation of Title 21 U.S.C. § 846 (conspiring to distribute a Section II narcotic substance to wit: dilaudid). Although the conviction is on appeal, Mr. Wilkett has been denied appeal bond and did not attend the hearing.

Discussion and Conclusions

Under the applicable provision of the Interstate Commerce Act, 49 U.S.C. 10922(b)(1), the "Commission shall issue a certificate to a person authorizing that person to provide transportation . . . if the Commission finds:

> "(A) that the person is fit, willing and able to provide the transportation . . .; and
>
> "(B) on the basis of evidence presented by persons supporting the issuance of the certificate that the service proposed will serve a public purpose, responsive to a public demand or need;
>
> "unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity."

Fitness to conduct the transportation requires not only physical capability, but more importantly, the ability to conduct the transportation in accord with the standards set out in law and regulation. There is no assumption of fitness implicit in the fact that an applicant already holds a certificate. Lieberman, 48 M.C.C. 399, 402 (1948). It is well settled that an applicant must establish his fitness to conduct a proposed operation regardless of whether or not he has previously been found fit to conduct other operations and had been granted a certificate authorizing such operations. Trioli, 53 M.C.C. 212, 215 (1951). The applicant has the burden of refuting the import of past illegal conduct in order to prove fitness. See Kroblin Refrigerated Express, Inc. v. United States, 197 F. Supp. 39 (N.D. Iowa, 1961); Fournier's Express, Inc. Ext. - Hartford, Conn., 108 M.C.C 589 (1969); and Jones - Common Carrier Application, 96 M.C.C. 100 (1964). When the Commission's Office of Consumer Protection challenges the carrier's fitness, the latter's burden does not shift since it is the proponent of an order which requires a finding of fitness to be made. St. Johnsbury Trucking v. United States, 326 F. Supp. 938 (D.C. VT., 1971); Radke (O.C.) - Various Commodities, 113 M.C.C. 89 (1971); Eagle Motor Lines - Lincoln, 107 M.C.C. 499 (1968).

As well established as the principle of fitness is, there is no inflexible formula which must be followed in making the determination. Each case must be decided on the facts presented, due consideration being given to all facts and circumstances. Chicago Exp., Inc. - Purchase - Whippett Motor Lines, 75 M.C.C. 531, 535 (1958).

The primary objection to fitness presented is the federal felony conviction of applicant occurring immediately prior to the filing of the application at issue. OCP contends that this conviction, while not directly related to violations of the Act or Commission regulations, is clearly indicative of a total indifference toward the requirements of law. In essence, the argument is that applicant's character has been shown to be other than that of a law abiding citizen, and that applicant is therefore neither fit, willing, or able to comply with the Interstate Commerce Act and Commission regulations.

The relevance of the applicant's character was discussed in Professional Driver Services, Inc. v. I.C.C., 376 F. Supp. 536 (D.C. Tenn, 1974). The court, in its review of a Commission decision, stated, ". . . [N] derogatory proof was introduced concerning the business activities of plaintiff, plaintiff's president, or the companion business owned by him (Drive-U-Service, Inc.). No evidence was introduced which would show any business deficiency, moral or character deficiency, or failure to satisfactorily perform service in plaintiff's operations." It is implicit, if not explicit, that character deficiency in the form of a showing that applicant is a convicted felon is both relevant and pertinent to the issue of fitness to comply wih the Act and the Commission's regulations.

While it is generally true that findings of unfitness are based upon past violations of the Act or regulations, the Commission is not limited by statute or regulation to consideration of only that type of evidence. The Commission may consider any evidence relevant to applicant's ability to act in a lawful manner. In Jones, supra, the applicant was charged and convicted of four counts of unauthorized transportation. Applicant argued that his conviction on criminal charges paid his debt to society and thus that his unlawful operations should not be considered. The Commission responded, "The primary purpose of the fitness provision of the act is to protect the public from carriers whose conduct demonstrate an unwillingness to operate in accordance with the requirements of regulation . . . . . [A]pplicant has demonstrated a flagrant disregard for the law. "The applicant was found not fit and the application was denied.

During the Wilkett hearing, applicant's representatives attempted to separate the fitness of the carrier itself from the fitness of Mr. James D. Wilkett. This separation is impossible. Mr. Wilkett declared himself under oath in the application to be "owner by sole proprietorship" and "engaged full-time in the management and operations of the company." The evidence presented does not negate these statements as to ownership or management. It would be unrealistic to consider him wholly separate and apart from his status as a convicted felon, or to disassociate his status either from the public interest which dictated his confinement. Mr. James D. Wilkett is James Wilkett d/b/a Wilkett Trucking Company. Mr. James D. Wilkett is also a convicted felon. His conviction is nearly instant in time to the filing of the application and thus not so distant in time as to be stale. Therefore, this conviction clearly demonstrates an inability by applicant to comply with the law.

Ultimate Findings And Order

Upon consideration of the evidence, the briefs, and applicable law, it is found that the applicant has failed to establish that he is fit, properly to conduct the proposed operations and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder. The denial of this application will not significantly affect either the quality of the human environment or conservation of energy resources. The application should be denied.

It is therefore unnecessary, in light of the above findings, to consider the public convenience and necessity question and the Administrative Law Judge does not intend to discuss it. See Berger Common Carrier Application, 119 M.C.C. 894, 896 (1974), wherein it was said: "A finding of fitness is therefore, a prerequisite to a grant of motor carrier operating authority. This determination may not in turn be based upon the finding that the proposed service is required by the public. The findings concerning fitness should be based on evidence

concerning applicant alone, and not on how strong a case has been presented by the supporting shippers or protestants.

It is therefore ORDERED:

That the application of James D. Wilkett d/b/a Wilkett Trucking Company be, and it is hereby, denied;

Dated at Washington, D.C., this 22nd day of September, 1981.

By the Commission William A. Shue, Administrative Law Judge.

William A. Shue

(SEAL)

JAMES H. BAYNE
Acting Secretary

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INTERSTATE COMMERCE COMMISSION

SERVICE DATE
DEC 8 1981

DECISION

No. MC-121794 (Sub-No. 7)

JAMES WILKETT, D/B/A WILKETT TRUCKING COMPANY-EXTENSION
OKLAHOMA AND TEXAS
(Stigler, OK)

Decided: December 2, 1981

By an appropriately filed application, James D. Wilkett, doing business as Wilkett Trucking Company, seeks a motor carrier certificate authorizing transportation of coal and coal products between points in Oklahoma and Texas. By decision of the Commission dated May 11, 1981, the Office of Consumer Protection was directed to participate to develop the record with respect to the fitness of the applicant and the proceeding was assigned for oral hearing. There were no protestants to the application.

The Administrative Law Judge denied the application after determining that applicant's recent felony conviction demonstrated an inability by applicant to comply with the law and thus warranted finding that he had failed to establish that he is fit, properly to conduct the proposed operations and to conform to the requirements of the Commission's rules and regulations thereunder. Applicant has appealed and Office of Consumer Protection has replied.

We have considered the record in this proceeding and find the Administrative Law Judge's statement of facts to be substantially correct in all material respects. As modified and supplemented here, we adopt it as our own. Certain facts will be summarized to the extent necessary for clarity of discussion. Our conclusions differ from those reached by the Administrative Law Judge. It is our opinion that the applicant has demonstrated his fitness to conduct the proposed operation at the present time, but that the authority granted should provide for further appraisal of fitness within the next 2 years. Since the record otherwise amply warrants granting the authority as sought, we reopen the proceeding on the existing record to grant the application subject to a limitation requiring evaluation of fitness evidence to be submitted by applicant within 2 years.

Factual Background

Pursuant to existing authority, applicant transports coal from certain Oklahoma counties to certain Texas counties. Applicant's proposal to consolidate and expand its existing authority is supported by two shippers and the evidence warrants a finding that the proposed operation will serve a useful public purpose, responsive to a public demand or need. Since the application is unopposed except as to fitness, we will not discuss the evidence of need in any detail.

This proceeding was set for oral hearing with Office of Consumer Protection participation on the issue of applicant's fitness because it came to the Commission's attention that applicant had been convicted of a felony shortly before filing this aplication. Evidence submitted at the hearing establishes that on February 12, 1981, Mr. James D. Wilkett (applicant) was convicted of conspiracy to distribute a controlled substance (dilaudid) and given a sentence of 15 years' confinement to the federal correctional institution at El Reno, OK. Even though his conviction was appealed, Mr. Wilkett commenced serving his sentence on February 26, 1981.

There is no indication on the record that the activities which warranted Mr. Wilkett's conviction were in anyway related to the trucking operation or that he has violated laws and regulations applicable to motor carrier operations. Existing shippers supporting the application considered applicant's equipment to be both reliable and available when needed. The applicant's banker testified favorably concerning the financial condition of the trucking company. A local businessman and pastor in Stigler, OK, where the carrier is located, testified as to the applicant's good business reputation. He also testified as to the good character of Mr. Wilkett's wife, as well as that of Mr. Davey Wilkett and Mrs. Gwendolyn J. Overlease, two of applicant's children who are involved in the operation of the carrier. No testimony was offered relating directly to the personal character of Mr. James D. Wilkett.

Wilkett Trucking Company's program for compliance with Department of Transportation (DOT) safety regulations, Commission accounting regulations, and other pertinent statutes and regulations, was detailed by Mr. Clifford L. Phillips, former District Supervisor for the Commission. Mr. Phillips became the carrier's regulatory compliance

supervisor on July 1, 1981. At the time, Commission and DOT regulations were explained to carrier personnel and a program instituted to insure compliance. A visit by Mr. Phillips on August 5, 1981, revealed efforts had been and were being made to implement the compliance program. The next compliance survey to be conducted by Mr. Phillips was to take place in November 1981.

Other witnesses were members of the Wilkett family involved in current operations. Two of Mr. James D. Wilkett's daughters, Mrs. Gwendolyn J. Overlease and Mrs. Connie M. Weatherford, conduct much of the recordkeeping and office paperwork, including that involved with maintenance of the compliance program. Mrs. Gladys Wilkett, applicant's wife, shares general supervisory and dispatching duties with applicant's son, Mr. Davey Wilkett.

Mr. Davey Wilkett is primarily responsible for the daily management and operations of the carrier. Before his father went to prison, the son managed the business during his father's absences for vacation or illness. Since Mr. James D. Wilkett began serving his sentence, Mr. Davey Wilkett has assumed the position of general manager responsible for general business decisions, traffic arrangement, supervision of operations, and maintenance supervision. Mr. James D. Wilkett calls his son daily. Mr. Davey Wilkett testified that these telephone calls deal with all aspects of the business including such subjects as the number of trucks that have become disabled.

Discussion and Conclusions

A finding of fitness is a prerequisite to a grant of authority under the applicable provision of the Interstate Commerce Act, 49 U.S.C. 10922(b)(1). There is very little precedent concerning consideration of nontransportation related misconduct in determining the fitness question, and, consequently, the criteria applicable to misconduct in fitness cases are usually stated in terms assuming the misconduct is transportation related. A typical statement of such criteria appears in Tennessee Cartage Co., Inc., Extension - Georgia, 128 M.C.C. 819, 821 (1978).

> In determining an applicant's fitness, consideration must be given to the nature and extent of an applicant's misconduct, if any, and any mitigating circumstances; whether an applicant's mis-

> conduct represents a flagrant and persistent disregard of the provisions of the act and our rules and regulations; whether an applicant has made an effort to correct past mistakes; and whether applicant is willing and able in the future to comport its operations to the requisite standards. Fitness must be determined on the basis of the unique facts and circumstances in each proceeding. Melton Truck Lines, Inc., Extension-Roofing, 88 M.C.C. 723 (1962); L & M Express Co., Extension-Crewe, Va., 106 M.C.C. 334 (1968); and Johnny Brown's Inc., Extension-Winchester, Va., 111 M.C.C. 905 (1970). These considerations are critical for otherwise a denial on fitness grounds would be merely a punitive measure instead of being properly aimed at protecting the shipping public and others from continuing misconduct by a carrier.

It is clear that past willful misconduct is not, as a matter of law, sufficient to bar a grant of authority. It may be considered as an element in assessing the applicant's present and prospective fitness. Armored Carrier Corporation v. United States, 260 F. Supp. 612, 615 (E.D. NY 1966). We note first that applicant's misconduct has not been shown to relate in anyway to his existing or proposed trucking operations and cannot be considered flagrant and persistent disregard of transportation related laws or regulations. It is also clear that his company is now being managed in such a manner as to insure that its operations will be in compliance with the laws, rules, and regulations governing interstate motor carriers. The Commission responsibilities in considering fitness of a motor carrier applicant are not directed toward punishment of misconduct, whether transportation related or not, but are to protect the public and others from continuing misconduct by a carrier. Without in anyway condoning applicant's misconduct in other areas, we are satisfied that he has demonstrated that his trucking operation is being conducted in compliance with applicable law and regulations. In order to ensure that such compliance continues into the future, we will provide applicant the opportunity to submit additional evidence of compliance within the next 2 years. Applicant's appeal indicates that he would not object to such a requirement and that he welcomes such an opportunity.

We find:

Performance by applicant of the service described in the appendix will serve a useful public purpose, responsive to a public demand or need. Applicant is fit, willing, and able properly to perform the granted service and to conform to the statutory and administrative requirements. This action will not significantly affect either the quality of the human environment or conservation of energy resources. An appropriate certificate should be granted.

It is ordered:

The decision of the Administrative Law Judge dated September 22, 1981, is vacated to the extent it is inconsistent with this decision.

The application is granted to the extent set forth in the appendix. Operations may begin only following the service of a certificate and upon compliance with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043), designation of process agent (49 CFR 1044), and tariffs (49 CFR 1310).

This decision will take effect 15 days from its date of service.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Clapp, Gresham, and Taylor. Commissioner Taylor did not participate.

(SEAL)

Agatha L. Mergenovich
Secretary

NOTICE: This proceeding is now administratively final within the meaning of 49 CFR 1101.2(f) of the Commission's regulations; and, in accordance with the provisions of Section 558(c) of the Administrative Procedure Act, any corresponding temporary authority expires and operations thereunder must cease upon the effective date of this decision, except that to the extent permanent authority is granted in this proceeding (and if partial, only to that extent) the corresponding temporary authority or portion thereof will continue in effect until a certificate or permit is issued and becomes effective. The filing of any further pleadings in this matter will not stay the expiration of the temporary authority related to the denied portion of the sought permanent authority.

APPENDIX

Authority to conduct the following operations will be issued in an appropriate document. This decision does not constitute authority to operate.

To operate as a common carrier, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting coal and coal products between points in Oklahoma and Texas. This authority will continue for a period ending 2 years from the date of certificate issuance. Within the 3 months prior to the end of the 2-year period, the carrier may request permanent extension of the authority by filing an appropriate pleading requesting reopening of the proceeding to receive tendered evidence of continuing fitness, willingness, and ability to provide the authorized operations in compliance with all applicable laws and regulations governing motor carrier operations. Unless the carrier submits acceptable evidence of continuing fitness, this certificate will terminate at the end of the 2-year period.

EC

SERVICE DATE

AUG 17 1982

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-121794 (Sub-No. 7)

JAMES WILKETT, D/B/A WILKETT TRUCKING COMPANY-EXTENSION-OKLAHOMA AND TEXAS
(Stigler, OK)

Decided: August 13, 1982

Upon examination of the record and the decision in this proceeding, we believe that this matter should be reopened and reconsidered. 49 U.S.C. 10322(g).

It is ordered:

Subject to the approval of the United States Court of Appeals for the District of Columbia Circuit in James Wilkett d/b/a Wilkett Trucking Company v. Interstate Commerce Commission and United States, No. 82-1373, this proceeding is reopened for further consideration on the present record.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Chairman Taylor was absent and did not participate.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

EC
P

SERVICE DATE
JAN 25 1983

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-121794 (Sub-No. 7)

JAMES WILKETT, D/B/A WILKETT TRUCKING COMPANY, EXTENSION - OKLAHOMA AND TEXAS
(Stigler, OK)

Decided: January 18, 1983

By our decision of August 13, 1982, we reopened this proceeding for reconsideration on the present record subject to the approval of the United States Court of Appeals for the District of Columbia Circuit. The Court granted our motion for voluntary remand on September 16, 1982.

Wilkett Trucking Company applied for motor common carrier authority to transport coal and coal products between points in Oklahoma and Texas. The application was unopposed and the evidence supported a need for the scope of the proposed service. By an order of the Commission, however, the Office of Compliance and Consumer Assistance (OCCA) was directed to participate in the proceeding to develop the record on applicant's fitness.

At the oral hearing, OCCA attorneys presented evidence that James D. Wilkett, the owner of Wilkett Trucking, was in federal prison on conviction of conspiracy to distribute drugs. Wilkett began serving his 15-year sentence four days after the application was filed with the Commission.1/ OCCA attorneys argued that Wilkett Trucking is a sole proprietorship owned and managed by James Wilkett. They contended that because of the close relationship between the company and Wilkett, Wilkett's personal fitness could not be separated from his company's fitness.

Several witnesses testified in favor of a grant of authority to Wilkett Trucking. Wilkett's son, David Wilkett, testified that he had been responsible for daily management of the business since his father's incarceration. He stated that the company is a family-run business and owned jointly by Wilkett and his wife. David Wilkett acknowledged that his father calls him from prison daily and they discuss business. His father still makes some management decisions.

1/ On November 25, 1981, James Wilkett was convicted of second-degree murder by an Oklahoma state court and sentenced to a 15-year prison term to be served consecutively with his previous sentence. Wilkett's conviction is on appeal.

Wilkett Trucking has operated in interstate commerce since 1978 and there is no evidence of record to show any violations of transportation laws or regulations.

Further, two shippers testified to the dependable service they had received from Wilkett Trucking. Other witnesses testified to the carrier's good business reputation and the personal fitness of Wilkett's family. No evidence of James D. Wilkett's personal fitness was presented. Finally, evidence was adduced that Wilkett Trucking has hired a supervisor (a former Commission employee) to inform the company of DOT safety regulations and ICC accounting regulations.

The issue presented by this proceeding is whether the conviction of a trucking company's president and sole proprietor for murder and drug offenses justifies finding the company unfit to receive an ICC license. In the prior decision, the entire Commission noted that the applicant and Wilkett Trucking are, legally speaking, one and the same person. The Commission concluded that applicant's fitness could not be separated from that of Wilkett Trucking, and found that applicant's recent murder conviction indicated such a basic disregard of human values that it was unlikely that applicant's motor carrier operations would be conducted with any greater respect for the laws and regulations applicable to such carriers. On this basis, applicant was found unfit and the request for authority was denied. We have reopened the proceeding to provide a more complete explanation of our decision to deny the authority sought.

Specifically, at issue here is applicant's fitness, willingness, and ability "to comply with this subtitle and regulations of the Commission;" see 49 U.S.C. 10922(b)(1)(A). Each applicant has the affirmative burden of proving its fitness each time it seeks authority from this Commission. An applicant's past misconduct is an element to be considered in determining its fitness to the extent that misconduct relates to the carrier's present and prospective ability to comply with the Interstate Commerce Act and the Commission's regulations. A denial on fitness grounds is not intended to be punitive in nature, but is warranted to protect members of the public from continuing misconduct by the carrier, and evidence of a carrier's willingness to correct past mistakes should be considered in making a determination of an applicant's fitness.

While we recognize that applicant is presently incarcerated, and does not exercise complete dominion over the operations of Wilkett Trucking, we note that applicant, in his appeal of the

initial decision in this matter, concedes that his fitness and that of his trucking company cannot be separated from each other. Certainly, applicant as the sole proprietor of Wilkett Trucking has the legal power to control the operations of Wilkett Trucking whether or not that power is fully exercised, see 49 U.S.C. 10102(6). Under the circumstances, we affirm the prior conclusion that applicant's fitness and that of Wilkett Trucking are inseparable. Applicant's willingness to commit the felonies he has been convicted of is certainly a sound basis for concluding he would also be willing to commit the lesser offenses proscribed by statutes administered by this Commission.

While there is no evidence that Wilkett Trucking has operated in violation of the Commission's licensing requirements or its regulations, and it has hired a regulatory compliance supervisor to assure continued compliance with these laws and regulations, we conclude that this evidence is insufficient to rebut the presumption of unfitness raised by applicant's felony convictions.

Applicant appears, on this record, to be a person who is willing to comply with present licensing and operation requirements because these requirements are not overly onerous. His narcotics and murder convictions reveal that applicant is also willing to disregard laws designed to protect the most basic of human values when it is convenient for him to do so. Moreover, because applicant is already in prison, and seems likely to remain there for a considerable time, the civil and criminal penalties that help us enforce our Act and regulations seem likely to have far less of a deterrent effect on applicant than they would on someone not presently incarcerated. Applicant's past actions lead us to believe that applicant would be perfectly willing to conduct illegal transportation operations in the future if he should find it in his interest to do so.

At bottom, we must balance what we see as a genuine risk of future noncompliance against applicant's assurances that he will conduct his operations lawfully. Given applicant's demonstrated inability to live within the law, we believe the public interest in authorizing new authority only to those applicants demonstrating fitness to hold it requires a denial in this instance. Accordingly, we affirm our prior decision finding applicant unfit.

We find:

Applicant has failed to demonstrate that he is fit to conduct the proposed operation.

It is ordered:

The prior decision of February 23, 1982, in this proceeding, to the extent inconsistent with this decision, is vacated and set aside.

The application is denied.

This decision will take effect 25 days from its date of service.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Commissioner Andre dissented. Vice Chairman Gilliam did not participate.

(SEAL)

Agatha L. Mergenovich
Secretary

Notice: This proceeding is now administratively final within the meaning of 49 CFR 1101.2(f) of the Commission's regulations; and, in accordance with the provisions of Section 558(c) of the Administrative Procedure Act, any corresponding temporary authority expires and operations thereunder must cease upon the effective date of this decision, except that to the extent permanent authority is granted in this proceeding (and if partial, only to that extent) the corresponding temporary authority or portion thereof will continue in effect until a certificate or permit is issued and becomes effective. The filing of any further pleadings in this matter will not stay the expiration of the temporary authority related to the denied portion of the sought permanent authority.

Office-Supreme Court, U.S.
FILED
FEB 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1202

In the Supreme Court of the United States

OCTOBER TERM, 1982

STEERE TANK LINES, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Interstate Commerce Commission granting an application for limited motor common carrier operating authority was supported by substantial evidence and was otherwise consistent with Section 5(a)(3) of the Motor Carrier Act of 1980, 49 U.S.C. (Supp. IV) 10922(b).

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In the Supreme Court of the United States

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STEERE TANK LINES, INC., PETITIONER

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INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9a-16a) is reported at 687 F.2d 104. The order of the Interstate Commerce Commission denying appeal (Pet. App. 6a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1982. On December 10, 1982, Justice White extended the time within which to file a petition for a writ of certiorari to January 17, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In order to promote competition among motor carriers, Congress, in Section 5(a) of the Motor Carrier Act of 1980, 49 U.S.C. (Supp. IV) 10922, modified the requirements for obtaining authorizations for service by motor common carriers. See H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 3, 12 (1980). Congress retained the preexisting requirement that the person seeking a certificate must be "fit, willing and able" to provide designated service, but eliminated the need for the applicant to show that the transportation is "required by the public convenience and necessity." [1] Instead, Congress directed the Commission to grant an application if it finds, on the basis of the applicant's evidence, that the proposed service "will serve a useful public purpose, responsive to a public demand or need," unless the Commission finds, on the basis of evidence presented by someone opposing the application, that the certificate would be "inconsistent with the public convenience and necessity." 49 U.S.C. (Supp. IV) 10922(b)(1)(B). Thus, Congress significantly altered the relative burdens of proof imposed on applicants and protestants in motor common carrier certification proceedings.

2. In January 1981, Petroleum Transport, Inc., a motor carrier operating 15 pieces of equipment exclusively within Texas, applied to the ICC for authorization to carry petroleum and petroleum products between points in Texas and

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[1] Prior to 1980, the Interstate Commerce Act, 49 U.S.C. (Supp. II) 10922(a), provided that the Commission "shall issue" a motor common carrier certificate if the Commission finds:

> (1) the person is fit, willing and able—(A) to provide the transportation to be authorized by the certificate; and (B) to comply with this subtitle and regulations of the Commission; and
>
> (2) the transportation to be provided under the certificate is or will be required by the public convenience and necessity.

New Mexico (Pet. App. 10a, 13a). The application was opposed only by petitioner, a substantially larger motor carrier authorized to perform similar services between the same states.

The Commission's Review Board found that Petroleum Transport's proposed service would "serve a useful public purpose, responsive to a public demand or need" (Pet. App. 2a). The Board noted that four petroleum shippers supported the application because existing service was inadequate, particularly during peak shipping periods (*id.* at 1a). The Board also found that petitioner had not shown in any way that Petroleum Transport's entry into the market would materially jeopardize petitioner's systemwide operations or be inconsistent with the public convenience and necessity (*id.* at 2a). Accordingly, the Board granted the application (*ibid.*).

Both an appellate division of the Commission and the full Commission denied petitioner's requests for an oral hearing and appeal, finding that no material facts were in dispute and that the decision of the Board was "in accordance with the evidence and the applicable law" (Pet. App. 4a, 6a).

3. The court of appeals affirmed (Pet. App. 9a-16a). Reviewing the relevant requirements of Section 5(a)(3) of the Motor Carrier Act of 1980, 49 U.S.C. (Supp. IV) 10922(b)(1), the court found that petitioner's arguments that Petroleum Transport was "unfit" to perform the proposed service, or that Petroleum Transport's entry would be inconsistent with the public convenience and necessity, were insubstantial (Pet. App. 13a). The court also found that the documentary testimony of four shippers, showing exactly how many shipments per week or month they expected to tender to the new entrant, constituted substantial evidence to support a finding that the "proposed service will serve 'a useful public purpose, responsive to a public

demand or need' " (*id.* at 13a, 14a). The court also held that the Commission's denial of petitioner's request for an oral hearing was permissible because the contested evidence was "immaterial" and thus an oral hearing "could serve no useful purpose" (Pet. App. 14a).

ARGUMENT

1. Petitioner attempts to characterize the issue in this case as an important question of statutory interpretation, arguing (Pet. 14-18) that Congress did not intend the Commission to authorize competing motor carrier services on the basis established here. In fact, the issue here is simply whether the evidence was sufficient to support the Commission's findings that the requirements of the Motor Carrier Act of 1980 were satisfied. The decision of the court of appeals that there was substantial evidence to support the Commission's order allowing a single common carrier to provide limited service between two states was clearly correct and does not warrant further review by this Court.

Contrary to petitioner's assertion (Pet. 22), the evidence regarding shipper demand for Petroleum Transport's service was not impermissibly vague; all four shippers gave specific testimony as to their intended use of the new service, including exact numbers of shipments per month or week (Pet. App. 14a). This testimony, given under oath,[2] is

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[2]There is no substance to petitioner's claim (Pet. 23) that the evidence in this case (and in all application proceedings) is unreliable because "[t]he Commission is now refusing to set any motor carrier of property entry application for oral hearing" and "[t]he knowledge that no application will be set for oral hearing and no shipper ever cross-examined inevitably leads to careless testimony." Written testimony submitted in Commission proceedings in which no oral hearing is held is sworn testimony to which the usual perjury penalties apply. See 47 Fed. Reg. 49558 (1982). Moreover, the Commission holds oral hearings on applications of motor carriers of property when, unlike in this case, material facts are in dispute. See 47 Fed. Reg. 49558 (1982). See, *e.g.*, *James Wilkett, Extension - Oklahoma and Texas*, No. MC-121794 (Sub-No. 7) (ICC Jan. 25, 1983).

just the kind of evidence that Congress recognized as "the most effective evidence" of demand or need (H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 14 (1980)). It amply satisfies Congress' desire that the applicant "come forward with *some evidence* of a public demand or need for the service." *Id.* at 14 (emphasis added). Nothing in the statute suggests that Congress intended that shippers be obliged to specify why they would use the proposed service; it is sufficient that they would use it and that therefore there is a demand for it. Only if the protestant can demonstrate that there is serious reason to doubt the veracity of this testimony would there be any reason for the Commission to inquire further.

2. Petitioner contends (Pet. 18-19) that the court of appeals did not affirm the Commission's decision on the basis the agency articulated. The court in fact affirmed because there was substantial evidence to support each of the statutory findings made by the Commission—that Petroleum Transport showed that it was "fit, willing, and able" to perform the proposed service, that its service will serve a useful public purpose,[3] and that petitioner failed to show that the service would be inconsistent with the public convenience and necessity (Pet. App. 11a, 14a). Accordingly, the court evaluated the decision under precisely the same criteria as the Commission.

The court of appeals did criticize the "unfortunate emphasis in the Commission's order on the inadequacy of existing common carrier services" (Pet. App. 13a-14a). The

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[3]Contrary to petitioner's suggestion (Pet. 8-9), the court of appeals did not "invent" any new test by which to judge the need for new service. Rather, the court simply summarized the evidence upon which the Commission determined that the new service would serve a useful public purpose. That the court in summarizing the evidence did not use the identical words the Commission used is hardly a basis for concluding that the court adopted a new "test" or standard.

court added, however, that "[t]he Commission's order unmistakably, if indirectly, indicates that it was aware of and considered" the evidence that the shippers would use the service if it were available (*id.* at 14a). That conclusion is fully consistent with this Court's admonition that a reviewing court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-286 (1974).[4] Accordingly, further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Interstate Commerce Commission

FEBRUARY 1983

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[4]Petitioner's argument that the Commission's focus on need and the court's focus on demand involve fundamentally different grounds for decision ignores the interrelationship between the two terms. The very fact that these shippers can testify that they would demand specific service if it were available is essentially a statement that their present needs are not fully satisfied.

DOJ-1983-02